On Collision Course with the Material Core of the Slovak Constitution

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Last week on Tuesday, the Constitutional Committee of the Slovak Parliament discussed the most extraordinary subject in a meeting attended by a most extraordinary guest. The Committee was reviewing a draft constitutional amendment on judicial reform that would, among other things, take away the power of the Constitutional Court to review constitutional amendments. At the meeting, the Minister of Justice and MPs discussed potential benefits and drawbacks of stripping the Court of the jurisdiction to review constitutional amendments, with the President of the Court seated next to them.

Aware of the significance of the proposal, The Court President felt compelled to travel to the capital that day to address the MPs directly. He did not hide his surprise about the proposal: “This is the most important intervention in the Constitution. Please reconsider if it is necessary. I do not know where this proposal originated, but it is not good. It is absolutely unacceptable.” The President pleaded with the MPs to trust the Court not to overextend the unamendability doctrine and warned them that it is there as a last resort to protect democracy. If the MPs wish to do away with this defensive mechanism, who will save democracy against abusive constitutional change – for example adopting the death penalty or extending the term of the Parliament from four to 15 years?

I will try to answer some of the questions that confounded even the President of the Court, namely where the proposal to disable the judicial review of constitutional amendment originated and why the amending actors think it is appropriate.

The proposal represents the last escalation in the conflict about who has the final word on the contents of the Constitution. At the beginning of the year 2019, the Court in a historic ruling invalidated a constitutional amendment for breaching the implicit core of the Constitution. Notwithstanding a few critical statements at the time, it took political actors until now to respond to the decision.

Where it came from

When the MoJ first submitted the constitutional amendment bill on judicial reform to the interdepartmental review in July 2019, the provision disabling judicial review of constitutional amendments was not in the draft. The MoJ rewrote the draft to forbid the Constitutional Court from reviewing amendments afterwards, based on comments it received from the public and academia. The academia, general public and governmental agencies had approximately one month to discuss the draft, which resulted in over two hundred comments for revision. During this time, changes to the

material core of the Constitution or to the power of the Court to review constitutional amendments were not on the table.

From a cursory review, only two comments touched on the subject of unamendability (n=241). One of the comments against the bill was raised by the Association of Judges of Slovakia, using the vocabulary of material core and unamendability. The Association saw a tension between the material core of the Constitution and the amendment bill, hinting that it was likely to litigate the question.

The other comment was my own. The MoJ proposed to introduce concrete judicial review to complement the abstract review of legislation. But based on the decision of the Court on unamendability from January 2019, the power to review legislation had now been extended to cover constitutional amendment. The proposed change, therefore, could have enabled the Court not only to review amendment in cases of abstract constitutional review but also in constitutional complaint cases. I asked the MoJ to clarify if this was the intended outcome. The comment was rejected at the time because the MoJ likely already knew they wanted to get rid of the power of the Court to review constitutional amendments.

After the interdepartmental review process concluded, the MoJ rewrote the draft amendment to also extended the exceptions to the jurisdiction of the Constitutional Court stipulated in Article 125 to apply also to constitutional amendment. The amendment provision would read:

> "The Constitutional Court does not decide on compliance of legislative bills, draft generally binding regulation, and ***constitutional amendment*** with the Constitution, an international treaty promulgated in a manner laid down by law, or with constitutional acts [emphasis added]."

Although this development came to many as a surprise, in retrospect it seems that the governing majority had several times hinted that it is considering to disable the judicial review of constitutional amendments. During the selection hearings for Constitutional Court judges in September 2020, for example, the deputy chairman of the Constitutional Committee kept asking candidates if the amending actors have unlimited power to change the Constitution. At least one candidate received a question if the amending actors can abolish "A) the Judicial Council, B) the Prosecutors Office or C) the Constitutional Court?" The chairman also asked directly if the "constitution-maker" can disable the power of the Court to review constitutional amendments. The point is that political actors have been preparing to respond to the assertion of power by the Court, which according to them "shamed the constitution-maker" for a legitimate exercise of the amendment power.

Scope for Legitimate Response

The lack of deliberation of the proposal and haste with which the amending actors push for the change is problematic. However, there continues to be normative disagreement about whether the Court should be able to review constitutional amendments, even though in this specific instance the Parliament

is clearly overstepping the boundary of a legitimate response. The President of the Constitutional Court had himself previously criticised the 2019 decision on unamendability. At the meeting of the Constitutional Committee on Tuesday, he went further to find fault with the former composition of the Court for a heavy-handed application of the unamendability doctrine.

In confronting the Court, the amending actors rely on such criticism of the application of the unamendability doctrine in Slovakia, voiced in academia as well as dissenting opinions of Constitutional Court judges in the case *PL. ÚS 21/2014*. However, the conflict is not primarily about whether there is a limit on the power to amend the Constitution. Rather, what is questioned is who, when, and how has the authority to define the limit. The most recent amendment to the debated constitutional bill, for example, proposes to deny the ability of the Court to review constitutional amendment only against domestic constitutional law, but not human right treaties and binding international law.

The amending actors reject the unamendability doctrine to the extent that it is a judicial tool for the control of constitutional change since the Court is also a constituted power. They fear that the doctrine is limitless since the Court held that its "power to protect the Constitution of the Slovak Republic extends across the whole sphere of constitutionality and is unconditional" (PL. ÚS 21/2014 [70]). Instead, the amending actors argue for political control of the amending process, exercised by the people or civil society. The problem with this counterproposal is that the evidence in support of the claim that the people can protect themselves against abusive constitutional change is weak, especially in Slovakia where the formal amendment rules are permissive.

There are relatively few institutional means for the public to inhibit abusive constitutional change. A three-fifths majority of all MPs (90/150) can change the Constitution or even adopt it anew without any need to consult other institutions or the people. As the current amendment process itself illustrates, the deliberation of an amendment bill can be frustrated by last-minute changes to its contents even relatively late in the process. Moreover, the low threshold for constitutional change allows fleeting majorities to dominate the amendment process, and since the Constitution does not set up a higher threshold for the adoption of a new constitution, political actors always have access to the complementary strategy of a wholesale replacement of the document. Even now, the amending actors could decide to formally replace the Constitution with the document that is same to the letter, except for a new provision against the judicial review of constitutional amendments.

Instead of limiting the power of the Constitutional Court, the amending actors should focus, in good faith, on redesigning amendment rules to contribute to the articulation of the material core of the Constitution in line with the case-law of the Court. The fact the Court spoke first, does not mean that the amending actors have no say in refining the contours of the unamendability doctrine. However, the proposed change to disable the power of the Constitutional Court to review constitutional amendments is ultimately a step in the wrong direction.

What Next?

Instead of a conclusion, let me venture to predict that if adopted by the Parliament, the amendment will be first vetoed by the President and then litigated in the Constitutional Court. Although a portion of sitting Constitutional Court judges expressed their disagreement with the application of the unamendability doctrine in the past, confronted with a direct challenge to the authority of the Court, they will have to defend the institution. Otherwise, the Court would suffer considerable reputational damage.

The bottom line is that the jurisdiction-stripping proposal will in the short-term lead to constitutional conflict, but hopefully, in the long run, result in improvement of the quality of the amendment design and the particular conception of unamendability doctrine as applied in Slovakia. There is currently normative disagreement about the doctrine in Slovakia, and the ensuing showdown will clarify the constitutional allocation of powers and reduce the uncertainty in the future. Similar proposals to strip courts of the power to review constitutional amendments, unfortunately, prevailed in Hungary, but courts in India, Belize and elsewhere successfully fended off the attack. The Slovak Constitutional Court can rely on domestic and supra-national support structures, such as the Venice Commission that seems to hold the opinion that at least procedural review of constitutional amendments is legitimate.
